

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**EDGAR KOIGI**

Claimant

V.

**INTERNATIONAL PAPER COMPANY**

Self-Insured Respondent

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Docket No. 1,062,892

**ORDER**

Respondent, through Ryan D. Wertz, of Overland Park, requested review of Administrative Law Judge William G. Belden's January 9, 2015 Award. Claimant appeared through Joshua P. Perkins, of Kansas City, Missouri. The Board heard oral argument on June 2, 2015.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the Award's stipulations.

**ISSUES**

The judge found claimant sustained personal injury by accident arising out of and in the course of his employment on August 27, 2012 and the accident was the prevailing factor in causing his medical condition, need for treatment and resulting disability. The judge awarded claimant benefits based on a 10% whole body impairment and up to \$500 in unauthorized medical treatment, but denied future medical treatment.

Respondent requests reversal, arguing claimant failed to prove he sustained personal injury by accident arising out of and in the course of his employment. Respondent contends claimant's motor vehicle accident earlier in the day on August 27, 2012, was the prevailing factor in causing claimant's medical condition, need for treatment and/or disability. Claimant maintains the Award should be affirmed.<sup>1</sup>

The issues for review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment, including whether his alleged accidental injury is the prevailing factor in his medical condition, need for medical treatment and/or disability?
2. What is the nature and extent of claimant's disability?
3. Is claimant entitled to unauthorized medical treatment?

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<sup>1</sup> Claimant indicated in his brief that he is not seeking future medical treatment. His counsel reiterated at oral argument that he had no argument against the judge's denial of future medical treatment.

**FINDINGS OF FACT**

Claimant, 38 years old, began working for respondent in April 2007 as a corrugator machine assistant operator. He used a roll tugger – similar to a forklift – to pick up and move large rolls of paper before placing them inside a machine.

Claimant was involved in a minor motor vehicle accident at 11:35 a.m. on August 27, 2012.<sup>2</sup> According to a recorded statement claimant gave to his car insurer,<sup>3</sup> he was stopped at a traffic light in his Lincoln Navigator. He was talking to his daughter when he thought the light had turned green. He proceeded to move forward and his vehicle “touched” the bumper of the Toyota Sienna in front of him.<sup>4</sup> In the recorded statement, claimant denied being injured in the motor vehicle accident. Claimant similarly testified there was no damage to his vehicle and he did not suffer any injuries or seek medical treatment because of the accident. Claimant was wearing a seat belt. Claimant indicated the other vehicle had a slight tear, about four inches long, in the rear bumper.

Claimant’s work on August 27, 2012, started at 3:00 p.m. While at work that day, claimant was driving a forklift to empty trash. It was a full-size forklift, not the roll tugger he normally operated. After dumping the trash, he backed up and stepped on the brake pedal, but the forklift did not stop and struck two rolls of paper, each weighing approximately 5,000 pounds. The impact caused claimant to be jerked from his seat and moved sideways. At the time of the collision, the forklift was moving at a “jogging pace” and claimant was wearing a seatbelt.<sup>5</sup> The paper rolls and forklift were undamaged. Claimant reported the accident to his supervisor the same day. Respondent offered medical treatment, but claimant initially declined because he thought his pain would subside. Claimant continued to work his regular duties.

Claimant’s testimony regarding the onset of complaints or symptoms was inconsistent. At his deposition, claimant testified he told his supervisor about the incident a few minutes after it occurred and he declined medical attention after his supervisor asked him if he wanted to see a doctor. He testified he next spoke to his supervisor about having a sharp pain in his low back the following week on a Thursday (possibly September 6, 2012) that had been present since the preceding Monday (possibly September 3, 2012), and he first had leg symptoms maybe three weeks after his accident.

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<sup>2</sup> Claimant initially denied being involved in a motor vehicle accident on August 27, 2012 or any motor vehicle accident in the five years before his deposition. He later testified he did not consider this “fender bender” to be an accident because there was no property damage or injury to any vehicle occupants. (See R.H. Trans. at 42-43). At oral argument, respondent acknowledged there was no evidence claimant was injured in an admittedly low speed and minor impact car accident.

<sup>3</sup> *Id.*, Resp. Ex. A. The recorded statement was obtained on August 28, 2012.

<sup>4</sup> *Id.* at 23.

<sup>5</sup> *Id.* at 14, 33.

At the regular hearing, claimant testified he immediately experienced a “slight pain” in his low back above his belt line.<sup>6</sup> He testified his supervisor offered medical treatment, but he declined because he thought his pain would subside. Claimant insisted he had low back pain when he reported his accident to his supervisor, even when confronted with his contrary deposition testimony in front of the judge.<sup>7</sup> Claimant testified he asked respondent for medical treatment three days after his accident.

Respondent referred claimant to Concentra where he had conservative treatment on September 6, 2012. Claimant told Concentra his body was jolted a bit when his forklift gently bumped into a paper roll, which caused him momentary right lumbar region pain which went away immediately, but returned the following morning.<sup>8</sup> Treatment through September 17, 2012, did not relieve his symptoms.

Claimant was referred to Alexander Bailey, M.D., a board certified orthopedic surgeon, who examined him on February 12, 2013. Claimant told Dr. Bailey he drove a forklift into a roll of paper, was jerked in his seat, developed back pain and reported it that very day. Claimant complained to Dr. Bailey about ongoing low back and bilateral leg pain. Dr. Bailey noted claimant denied ever being involved in a motor vehicle accident in August 2012, despite being asked on more than one occasion during the examination. Lumbar x-rays showed minimal degenerative disc disease.

Dr. Bailey assessed claimant as having a low back strain and a possible spinal injury, but with unrealistic clinical exam findings, consistent with malingering and manipulative pain behaviors. Dr. Bailey also noted claimant might be confounding the cause of his injury to his work accident instead of his motor vehicle accident earlier on the same date. Dr. Bailey requested additional information surrounding the August 2012 motor vehicle accident and recommended a lumbar spine MRI to identify the reasonableness of claimant’s mechanism of injury. In addressing causation, Dr. Bailey stated:

At the present time, I think the prevailing need for [an] MRI scan is the possibility of a work-related condition and injury and further causation statements will be created upon review of an MRI. I do not believe there is satisfactory information at this stage to deny this is a work-related condition and injury until MRI scans are available.<sup>9</sup>

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<sup>6</sup> *Id.* at 15.

<sup>7</sup> The judge understood respondent was attacking claimant’s credibility based on prior and inconsistent testimony. (*Id.* at 39).

<sup>8</sup> Bailey Depo. at 5-6. This information comes from Dr. Bailey’s testimony and does not reflect a party attempt to bootleg into evidence opinions of a non-testifying physician. See K.S.A. 44-519 and *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130-31, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

<sup>9</sup> Bailey Depo., Ex. 2 at 14.

Claimant had the MRI and returned to Dr. Bailey on April 25, 2013. Dr. Bailey's review of the MRI showed "rather significant positive findings[,] including "[c]lear evidence" of a single level bilateral disk herniation causing moderate stenosis and some neurologic impingement.<sup>10</sup> Dr. Bailey assessed claimant as having a "[h]erniated nucleus pulposus, spinal stenosis, L4-5 or 5/S1, resulting in discal injury, low back pain and leg pain."<sup>11</sup> Absent information regarding a motor vehicle accident, Dr. Bailey stated claimant's work accident may have caused his injury. Dr. Bailey recommended conservative treatment.

On July 30, 2013, Dr. Bailey issued an addendum report after reviewing additional information confirming claimant was involved in a motor vehicle accident on August 27, 2012. Dr. Bailey's report stated claimant's motor vehicle accident involved a "higher energy force" than did the forklift incident.<sup>12</sup> The doctor further stated:

On full review of the records, this patient [was] involved in a motor vehicle accident on 08/27/2012, the same day of a purported forklift injury, and given the fact pattern at hand, the patient's denial of a motor vehicle accident, the patient's clinical presentation, I feel compelled to indicate that the prevailing factor for the need for medical and/or surgical attention as it relates to the lumbar spine is a personal medical condition and more likely than not identified to be causally related to a motor vehicle accident, personal in nature and not an on-the-job work injury. I believe the medical records, the confirmation of a motor vehicle accident and the patient's presentation now confirms this.<sup>13</sup>

Dr. Bailey testified claimant had a combination of abnormalities, including degenerative disc disease, circumferential disc bulge of the L4-5 or L5-S1 level with some neurologic impingement. Dr. Bailey testified the motor vehicle accident and not the work accident was more likely the cause of claimant's symptoms. Dr. Bailey testified claimant directly denied a motor vehicle accident, but because a motor vehicle accident did occur, he gave "precedent to the motor vehicle accident's causable relationship."<sup>14</sup> He further testified the motor vehicle accident was the prevailing factor for inciting a chain of events leading to the patient's current symptoms.<sup>15</sup>

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<sup>10</sup> *Id.*, Ex. 2 at 4.

<sup>11</sup> *Id.*, Ex. 2 at 4.

<sup>12</sup> *Id.*, Ex. 2 at 1.

<sup>13</sup> *Id.*, Ex. 2 at 1-2.

<sup>14</sup> *Id.* at 22.

<sup>15</sup> *Id.* at 32-33.

Dr. Bailey acknowledged claimant exhibited symptoms of potential radiculopathy. Dr. Bailey admitted claimant reported no low back problems prior to his work accident nor did the medical records reflect prior problems. He testified he believed that both claimant's motor vehicle accident and work accident were minor events and he did not know the speed of claimant's vehicle or his forklift prior to the two impacts on August 27, 2012.

On February 25, 2014, the judge appointed Vito Carabetta, M.D., to perform an independent medical examination. Claimant saw Dr. Carabetta, who is board certified in physical medicine and rehabilitation, on June 11, 2014. Dr. Carabetta reviewed medical records, took a history and performed a physical examination. Claimant told Dr. Carabetta he did not immediately have pain when the accident occurred, but gradually developed low back pain within one hour. Claimant also reported being involved in a minor motor vehicle accident where "they barely tapped the bumper" in March 2012, and denied a motor vehicle accident occurring on the same day as his work injury.<sup>16</sup>

Dr. Carabetta diagnosed claimant with lumbar disk herniation by history. The doctor noted claimant did not try to fake anything when examined, was not malingering and was "[v]ery definitely" credible.<sup>17</sup> Dr. Carabetta assigned claimant a 10% whole person impairment under the AMA *Guides*<sup>18</sup> (hereafter *Guides*), consistent with a Category III presentation even though claimant's condition did not necessarily fit the description, verification and structural inclusions for such category and he had ongoing signs of radiculopathy. Dr. Carabetta assigned the impairment because claimant's radicular symptoms could easily be aggravated.

Dr. Carabetta testified the mechanism of injury was consistent with claimant's herniated disk and he believed the work accident was the prevailing factor. Dr. Carabetta indicated his opinion would not change if claimant had been involved in a minor fender bender on the day of his work accident, but his opinion might change if claimant was involved in a substantial motor vehicle accident on August 27, 2012.

At the regular hearing, claimant complained of daily low back pain and bilateral leg tingling and being unable to fully bend. He did not miss work because of his symptoms, but he no longer drove a forklift after the accident. Claimant testified he continued working for respondent and made comparable wages until the plant closed and he was laid off on June 19, 2013. Claimant received unemployment benefits for approximately six months. On May 21, 2014, claimant began working about 20 hours a week for ReadyJet cleaning leather on jets. He testified he is physically capable of performing this job.

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<sup>16</sup> Carabetta Depo., Ex. 2 at 2.

<sup>17</sup> *Id.* at 26.

<sup>18</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

In the January 9, 2015 Award, the judge stated, in part:

The first issue is whether Claimant was involved in an accident on August 27, 2012. Claimant's testimony that the forklift he was driving on August 27, 2012 struck two rolls of paper is uncontradicted. It is unclear the basis for Concentra's reported history of the forklift gently striking the rolls. Claimant testified the forklift abruptly stopped from a jogging pace, causing him to be jerked up from his seat. Dr. Carabetta, based on his personal knowledge of the size of the paper rolls, testified the impact could cause a sudden stop. Although Claimant's testimony differs on the progression of his symptoms after the accident, Claimant consistently testified to feeling a sudden onset of some symptoms after the incident with the forklift. An accident need not produce all the symptoms of an injury at the time of the accident to be compensable. See *Barber v. State of Kansas*, Docket No. 1,067,643, p.7 (W.C.A.B. 2014). The Court finds Claimant was involved in an incident on August 27, 2012 while driving a forklift for Respondent that produced at the time symptoms of an injury.

The next issue is whether the incident of August 27, 2012 was the prevailing factor causing the alleged lumbar disc herniation. The greater weight of the credible evidence confirms Claimant was also involved in a motor vehicle accident on August 27, 2012, although it produced minimal property damage consisting of a tear to the bumper of the minivan Claimant struck. There is no evidence Claimant experienced symptoms of an injury immediately after the accident, and Claimant consistently stated he was not hurt as a result of the motor vehicle accident. Based on the minimal property damage and lack of injuries, the Court finds the motor vehicle accident involved very little impact and occurred at a low rate of speed. Dr. Bailey initially thought the work-related incident was the prevailing factor causing the lumbar disc herniation, but he later changed his opinion based on the understanding the force of impact from the motor vehicle accident was greater than the impact from the accident with the forklift at work. Dr. Bailey later attributed part of Claimant's condition to degenerative disc disease, but Dr. Bailey's earlier treatment records and the report of the MRI scan do not suggest degenerative disc disease. Dr. Carabetta, the Court-ordered neutral examining physician, stated the work-related accident with the forklift was the prevailing factor causing the disc herniation because the force of impact from the motor vehicle accident was minor, compared to the greater force of impact from [the] work-related forklift accident. The Court finds the opinions of Dr. Carabetta more credible than the opinions of Dr. Bailey because Dr. Carabetta had a better understanding of the objects involved in the collisions, because Dr. Carabetta's understanding of the force of impacts from the collisions is consistent with the factual evidence concerning the minimal nature of the motor vehicle accident and because Dr. Carabetta served as the Court-appointed neutral physician. The Court concludes Claimant met his burden of proving the work-related accident of August 27, 2012 was the prevailing factor causing the lumbar disc herniation.

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In this case, Dr. Bailey did not provide an opinion on permanent impairment. Dr. Carabetta testified Claimant sustained permanent functional impairment of 10% of the body as a whole on account of the lumbar disc herniation. Dr. Carabetta's impairment rating is based on a history of radiculopathy confirmed by the MRI scan. The Court finds Claimant sustained functional impairment of 10% of the body as [a] whole for the herniated lumbar disc caused by the work-related accident of August 27, 2012 and concludes Claimant should receive an award of permanent partial disability compensation based on 10% impairment of the body as a whole.<sup>19</sup>

Thereafter, respondent filed a timely appeal.

### **PRINCIPLES OF LAW, ANALYSIS & CONCLUSIONS**

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.<sup>20</sup> The burden of proof shall be on the claimant. The trier of fact shall consider the whole record.<sup>21</sup>

K.S.A. 2012 Supp. 44-508 provides:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

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<sup>19</sup> ALJ Award at 6-8.

<sup>20</sup> K.S.A. 2012 Supp. 44-501b(b).

<sup>21</sup> K.S.A. 2012 Supp. 44-501b(c).

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

. . .

(u) "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

Respondent's main contentions are claimant's credibility is suspect because he denied having a motor vehicle accident within five years before his deposition, denied having the August 27, 2012 motor vehicle accident and his testimony regarding the onset of his symptoms changed from him having no symptoms when the accident occurred to him having symptoms when the accident occurred. Respondent posits claimant is not believable and if the accident did not produce symptoms of an injury at the time of the accident, he did not have a compensable accident based on K.S.A. 2012 Supp. 44-508(d).

The Board adopts the judge's Award. The judge was able to witness and assess claimant's testimony, particularly when respondent pointed out his inconsistent testimony at the regular hearing. The judge was able to weigh claimant's discovery deposition testimony against his differing regular hearing testimony. The judge certainly acknowledged questions with claimant's credibility, particularly with respect to the onset of his symptoms and his failure to tell physicians about his motor vehicle accident earlier in the day. Despite such concerns, the judge concluded claimant had some symptoms of injury after the work-related forklift accident and he had some discussion of an injury with his supervisor when he gave notice of his injury by accident, even though not all of his symptoms were immediately present. The Board concludes claimant had an injury by accident which arose out of and in the course of his employment, as statutorily defined in K.S.A. 44-508(d). His work accident was the prevailing factor in his injury (including a herniated lumbar disc), need for medical treatment and his residual impairment and disability. In short, the Board agrees with the judge.



We also agree with the judge that the August 27, 2012 motor vehicle accident was minor and produced no injury. Dr. Bailey's belief that the motor vehicle accident involved more force than the forklift incident is backed with insufficient factual support. Like the judge, the Board adopts the opinions of Dr. Carabetta, the court-ordered and neutral examining physician. Dr. Carabetta would only change his causation opinion if claimant's motor vehicle accident was substantial and not minor. Respondent admitted the motor vehicle accident was minor.

We similarly affirm the judge's rulings regarding the nature and extent of claimant's impairment and his award of unauthorized medical expense.

**AWARD**

**WHEREFORE**, the Board affirms the January 9, 2015 Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2015.

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BOARD MEMBER

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BOARD MEMBER

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Honorable William G. Belden